Sandra Hill v. U.S. General Accounting Office

Docket No. 96-06

Date of Decision: September 30, 1997

Cite as: Hill v. GAO (9/30/97)

Before: Leroy Clark, Chair

Settlement agreement

Reduction-in-Force

Contract law

Removal

DECISION

This matter is before the Personnel Appeals Board (PAB) on a petition for enforcement of a settlement agreement, filed on July 12, 1996 on behalf of Petitioner, Sandra V. Hill. Petitioner challenges the action of the U.S. General Accounting Office (GAO) in applying Reduction-in-Force (RIF) procedures to separate her from employment, allegedly in violation of the terms of a settlement agreement reached on April 28, 1992. See 4 C.F.R. §28.88. Petitioner seeks, *inter alia,* restoration to employment retroactive to her last day in pay status and back pay. Respondent GAO contends that the settlement agreement did not bar Petitioner's separation by means of RIF.

The Agency filed a motion for summary judgment; Petitioner filed an opening brief; and both parties submitted reply briefs. The motion for summary judgment was denied on January 9, 1997, and the parties proceeded to an evidentiary hearing on March 4, 1997. Subsequently, both parties submitted post-hearing briefs. As explained below, the Board concludes that Respondent did not violate the settlement agreement in separating Petitioner by RIF.

I. Factual Background

Introduction

Petitioner, Sandra V. Hill, began her employment with GAO in June 1976 at the GS-9 level. TR 33.[1] Doing evaluator work, she progressed to the GS-12 level. TR 33. In 1982 or 1983, Petitioner developed medical difficulties which impacted on her performance of evaluator duties. TR 34-36. Respondent began action to remove Petitioner from employment. TR 36. As a result, Petitioner sought counseling within the Agency as well as outside legal advice. TR 36-37. The Agency ultimately decided to demote Petitioner three grades to a GS-9, and consequently, she filed a

[1] "TR" refers to the transcript of the evidentiary hearing held on March 4, 1997.

complaint with GAO's Civil Rights Office in October 1989, alleging racial discrimination, sex discrimination, and discrimination based on disability. TR 37; Settlement Agreement[2] at 1. In October 1990, Petitioner lodged a charge with the Personnel Appeals Board Office of General Counsel (PAB/OGC), complaining that the Agency had failed to accommodate her disability. Thereafter, Petitioner filed a petition for review with this Board in December 1991. Settlement Agreement at 1.

Settlement Agreement

Petitioner and the Respondent entered into a settlement agreement on April 28, 1992, in resolution of Petitioner's 1989 Civil Rights Office complaint and 1991 petition before the PAB. The Board order dismissing the prior action directly referred to the terms of the settlement agreement. See PAB Docket 92-01, Order (June 8, 1992). Moreover, the administrative judge assigned to the earlier petition signed the agreement.

At the time of the settlement, Petitioner was employed in the Food/Agriculture Issue Area of the Resources, Community, and Economic Development Division (RCED) of GAO. The Food/Agriculture Issue Area then was located away from Agency headquarters at a separate audit site in Washington, D.C. Joint Stipulations, ¶2. In accordance with the agreement's terms, Petitioner, a program specialist, was assigned responsibility for maintaining and operating a library to serve the Issue Area. This position did not exist prior to the settlement agreement. Joint Stipulations, ¶3.

At issue in Petitioner's original complaint was the Agency's action in demoting her from GS-12 to GS-9. TR 5, 28; see Settlement Agreement, ¶6. She had been an evaluator, and was converted to the program specialist position at a lower grade. The settlement agreement required that GAO assign Petitioner tasks with the intention of providing her opportunities "to demonstrate her ability to take on assignments of increasing complexity and greater responsibility." Settlement Agreement, ¶2. Under the agreement, the Agency also was to provide training in furtherance of Petitioner's library duties:

> In conjunction with the assignments described in the preceding paragraph 2, and in order to assist employee in developing the skills, knowledge and abilities that will qualify her to perform official duties and for upward mobility, GAO shall undertake its best efforts within twelve (12) months of the date of this Agreement to make training available to employee.

Settlement Agreement, ¶3. Petitioner expected the position would provide the opportunity for

[2]References to the settlement agreement reached on April 28, 1992 in resolution of the earlier disputes will be cited as "Settlement Agreement." The agreement is found at several places in the record, including as the Attachment to the Pet. for Enforcement; Resp. Hearing Ex. 1; and Pet. Br. on Appeal, Ex. A.

promotions or increased duties. TR 38-39.

The settlement agreement did not specify an ending date, but did include in ¶4 a termination clause, which is pivotal to the present case. The relevant portion of the agreement enumerated three specific events which individually would cause the agreement to end:

> 4. This Agreement shall expire under any of the following circumstances:
>
> (a) Employee terminates her employment with GAO or GAO lawfully removes employee from employment;
> (b) GAO determines in good faith to discontinue the Issue Area Library, in which case GAO will reassign employee to duties that it determines in good faith will continue to provide employee with opportunities to develop skills, knowledge and capability to qualify her for upward mobility; or
> (c) The parties agree to terminate this Agreement for any reason.

The termination clause did not explicitly refer to either party's rights or obligations in the event of a RIF. Nor did the termination clause state that no other circumstances would override the agreement or cause its expiration.

Based on the language of the agreement, as well as testimony at the evidentiary hearing, it is clear that neither party anticipated a wide-scale RIF at GAO when the settlement was drafted. The settlement negotiations leading up to the signed agreement did not involve any discussion of a RIF scenario. Indeed, Mr. Paul Thompson, Agency counsel who participated in the agreement's drafting, testified that a general RIF "wasn't even on the radar screen" in 1992. TR 72. Rather, the concern was with protecting Petitioner in case the Agency determined the position being created could not last. TR 72.

Agency counsel intended to preserve GAO's rights with respect to lawful termination of Petitioner's employment by the inclusion of ¶4(a), which provides for termination of the agreement in the event of Petitioner's lawful removal from employment. TR 71.

Petitioner's counsel intended to preserve Petitioner's employment security in the event that the Agency determined in the future to discontinue the Food/Agriculture library: "We wanted to protect her from being sort of arbitrarily booted out, knowing they were creating this position for her, they could uncreate it if they wanted to, give her some protection for that." TR 27. Also behind the ¶4(b) termination provision was concern that the Agency might exercise bad faith and retaliate against Petitioner by eliminating the library position. TR 13, 15-16, 19-21, 23. Petitioner also bargained for upward mobility opportunities in light of the Agency action to demote her. TR 27-28, 38-39. There is nothing to support the contention that she was bargaining to limit the Agency's ability to lawfully terminate her employment under wholly unforeseen circumstances.

Neither party anticipated an agency-wide RIF of administrative, professional and support staff

(APSS) in 1992 when the settlement agreement was drafted. Neither party had in mind an Agency-wide RIF when they agreed in ¶4(a) that the settlement would terminate if GAO lawfully "removes employee from employment." Moreover, neither party had in mind an Agency-wide RIF when they agreed that if the Agency "determines in good faith to discontinue the Issue Area Library," it would "reassign employee to duties that it determines in good faith will continue to provide employee with opportunities to develop skills, knowledge and capability to qualify her for upward mobility." Settlement Agreement, ¶4(b).

Agency-wide Downsizing

In the Summer of 1995, Congress imposed on GAO a budget reduction of 25% to be implemented over the next two fiscal years. See Comptroller General Memorandum, "Impact of Budget Reductions on GAO" (Aug. 7, 1995) at 1 (Resp. Hearing Ex. 6). The Comptroller General then approved a workforce reduction plan to meet the budget reductions, including early-outs, buyouts, office consolidations and closings, and finally, RIFs. Id. at 4. The Assistant Comptroller General for Operations (ACG/Ops) was given responsibility for implementing and planning the Agency-wide reduction of administrative and professional support staff. Id. at 11. Senior managers were assigned to work in teams to coordinate implementation of the recommended APSS reductions. Id. at 1, 4, 7, 11.

In the Fall of 1995, some officials began to discuss the closing of the Food/Agriculture Issue Area library upon the audit site's anticipated return to headquarters. TR 42-43. At that time, the move was expected to take place in the Summer of 1997. TR 106. In December 1995, Mr. James Wells, RCED director of operations, was told that the move would be accelerated by one year to reduce costs. TR 107.

In November 1995, Petitioner provided Mr. Robert Robinson, then associate director of the Food/Agriculture Issue Area, with a one-page proposal for transitioning into another support position. TR 150; see Resp. Ex. 11. Mr. Robinson transmitted the proposal to Ms. Patricia Gleason, RCED's Human Resources Manager, and discussed the proposal with Petitioner's supervisor, Mr. Thomas Kai. In Mr. Robinson's view, the proposed function was not critical in light of the budget cuts then being imposed and the need to review each position for relative need. TR 149-51.

In January 1996 Petitioner asked Mr. Wells whether he knew of her 1992 settlement agreement and whether he could ascertain if it would protect her from the upcoming RIF of support staff. Mr. Wells contacted the Agency's Office of General Counsel, which informed him that the agreement did not limit the Agency's ability to separate Petitioner by RIF. Mr. Wells reported this information to Petitioner. TR 119-21.

Some effort was made to look for other possible placement for Petitioner during this period. Mr. Wells testified that he inquired about field office positions after Petitioner approached him about the impact of her settlement agreement on the RIF situation. TR 142.

During January and February 1996, Mr. Wells sought input concerning the duties performed by all APSS staff in RCED to facilitate making recommendations as to which were critical functions in a downsized environment. Mr. Robinson, who moved from assistant Issue Area director to director in January 1996, informed Mr. Wells of his opinion that the position of Issue Area librarian was not critical, particularly in view of the scheduled move back into the headquarters building. TR 102-05, 110, 152-54, 157.

In late March 1996, the ACG/Ops specifically informed RCED that it would be required to reduce its APSS positions from 54 to 38 in number. TR 99-100. RCED senior management--Mr. Wells as divisional operations director, the Assistant Comptroller General for RCED, and the director for planning and reporting--then recommended which 16 positions should be abolished. TR 101-02. The ACG/Ops approved the RCED recommendations and forwarded the list of identified positions to Personnel for analysis of the bump and retreat rights of the individuals whose positions were to be abolished. TR 102, 122-23.

Mr. Wells was not aware of Petitioner's bump and retreat rights when the positions to be abolished were selected, although he knew her position was listed. TR 123. He learned that she was scheduled to be separated by RIF on March 31, 1996, when he received the list of RCED employees to be RIFed. TR 123.

Petitioner's RIF

On April 9, 1996, Mr. Wells delivered Petitioner her RIF notice, which stated that she was to be separated by means of RIF, effective June 8, 1996. Resp. Ex. 2. The notice stated that Petitioner would be released from her current position of GS-9 program specialist, because her position was being abolished and her retention standing did not entitle her to be assigned to another position.[3] Id. At that time, Petitioner provided Mr. Wells with a one-page proposal for transitioning into another assignment. TR 123-24, 138-39; Resp. Hearing Ex. 10. After discussing this proposal with ACG/Ops, Mr. Wells informed petitioner that this type of position at GAO had been abolished. TR 125-26. Mr. Wells also inquired about the availability of this type of position in any field offices, and reported to Petitioner that no such positions existed. TR 124-25, 139.

GAO moved RCED's Food/Agriculture Issue Area back into the Agency headquarters building in May 1996. TR 107, 135, 149. The separate Issue Area library was closed at that time.

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[3]The retention standing information attached to Petitioner's RIF notice was as follows:
Zone of Consideration: RCED [Resources, Community, & Economic Development Division]
Job Group: AO77 [Program Specialist]
Tenure Group: 1 [3 or more years]
Veteran's Preference Subgroup: B [none]
Service Computation Date (SCD): 10-12-75
Adjusted SCD: 7-22-61 [with performance adjustment]
Performance Appraisal Average: 3.555556

Petitioner continued to perform duties in support of the library, including preparing materials for the move, until she received her RIF notice. TR 51-52, 56-58. After receiving her RIF notice, Petitioner used accumulated annual leave, and, upon returning to the office, was assigned various administrative tasks. TR 65.

Petitioner's RIF separation date was postponed to September 21, 1996, in accordance with GAO Order 2351.1, ch. 3, ¶4(b)(5), which allows GAO to defer an employee's RIF separation for up to one year, upon request, to enable the employee to achieve first eligibility for an immediate annuity. TR 64-65; Resp. Hearing Ex. 3.

II. Contentions of the Parties

Petitioner

Petitioner contends that the Agency unlawfully subjected her to the RIF action, and thereby broke its agreement with her, by failing to reassign her to another position "when it knew the Library was going to be abolished and when it was in fact abolished." Pet. Post-Hearing Br. at 5. In Petitioner's view, the plain language of the settlement agreement, ¶4(b), obligated the Agency to provide her with another position with upward mobility potential upon the discontinuation of the library. Id. at 18. Petitioner contends that "the decision to abolish the Issue Area Library was made well before the RIF occurred. Thus, under the terms of the Settlement Agreement, once the decision was made to abolish the Library, GAO was obligated to reassign Ms. Hill to another position." Petitioner's Reply to Motion for Summary Judgment at 2. She was entitled to such placement when the library was abolished, with the consequence that "she would have possibly been . . . subject to a subsequent RIF, . . . [but] she should not have been affected by the RIF conducted in April, 1996." Pet. Post-Hearing Br. at 18.

Petitioner further argues that the first clause of the termination provision, which provides for the agreement to expire upon Petitioner's lawful "removal" from employment, does not encompass separation by means of RIF. Rather, in the statutory scheme governing federal employment, "removal" is limited to certain adverse actions and to a consequence of unacceptable performance. Id. at 8.

Respondent

Respondent GAO counters that there is no support for Petitioner's claim that the parties intended to provide her with RIF immunity in the type of Agency-wide downsizing here at issue. Resp. Post-Hearing Br. at 2. In the Agency's view, the clause in ¶4(b) was intended to prevent an action taken to close the library and thereby deny petitioner work assignments that would provide upward mobility potential. *Id.* at 10-11. The provision did not embody RIF immunity, but addressed "situations when petitioner's employment does not come to an end but the library closes." *Id.* at 17. The Agency rejects Petitioner's contention that ¶4(b) operated to terminate the agreement and trigger an obligation on the Agency's part to "make a good faith effort to reassign" her to other duties to allow her "opportunities to continue to qualify for upward mobility." Motion for Summary

Judgment at 9. Respondent also contends that Petitioner's position "could serve to undermine or supplant the RIF retention rights provided by law, such as veteran's preference, to other employees who would have to be RIF'd in petitioner's place." Resp. Post-Hearing Br. at 20.

While noting that the termination provision does not address a wide-scale RIF scenario, the Agency argues that clause 4(a) of the termination provision should govern. The Agency takes issue with Petitioner's restrictive reading of the term "removes" from employment. Resp. Post-Hearing Br. at 13. In the Agency's view, its obligations to Petitioner for training and work assignments expired upon her separation, when she was lawfully "removed from employment" pursuant to RIF procedures. Motion for Summary Judgment at 8-9.

III. Analysis

Upon careful consideration of all the evidence of record, as well as the arguments of the parties, the Board concludes that, for the reasons set forth below, Petitioner has not established her claim that the Respondent's action in applying the RIF regulations to separate her as part of the Agency-wide RIF constituted a breach of the settlement agreement. Accordingly, the RIF action resulting in her retirement must stand.

Introduction

It is well established that a settlement agreement is a contract between the parties. *Greco v. Department of Army*, 852 F.2d 558, 560 (Fed. Cir. 1988); *Joos v. Department of Treasury*, 69 MSPR 398, 402 (1996). Like all contracts, a settlement agreement should be interpreted to carry out the parties' collective intent at the time of the agreement's drafting. *Greco*, 852 F.2d at 561. In deciding questions of law concerning the parties' intent, the parties' mutual intent is key. Williston on Contracts 3d Ed. §601 at 305. The inquiry into intent begins with the terms of the settlement agreement itself. *Dati v. Department of Navy*, 41 MSPR 397, 400 (1989); see *Greaves v. U.S. Postal Service*, 55 MSPR 337 (1992). As part of this inquiry, courts look to the reasonable use of words and how each party would reasonably have understood them; thus, in ascertaining the parties' intent, the circumstances under which words are used are always relevant. Williston on Contracts §607 at 378-80.

Applying these principles to the case at hand, we look first to the settlement agreement. The terms of the settlement agreement contain no specific reference to a RIF or Reduction-in-Force. The provision in ¶4 for the agreement to expire is couched in terms of three possible triggering events: (a) the employee "terminates her employment with GAO or GAO lawfully removes employee from employment"; or (b) "GAO determines in good faith to discontinue the Issue Area Library"; or (c) the "parties agree to terminate this Agreement for any reason." On its face, therefore, the settlement agreement does not specifically refer to a RIF as a triggering event for any of the provisions, nor does it exclude that possibility. Only the first two clauses of the termination provision are here at issue.

Because the terms of the agreement do not refer to a Reduction-in-Force, the inquiry necessarily

involves probing the intent of the parties at the time the settlement agreement was drafted as well as the actions surrounding the decision concerning the library and the RIF here at issue, *i.e.,* the events which caused Petitioner's separation from employment. From the evidence of record, it is clear that the settlement agreement was not written with an Agency-wide RIF in mind.

Settlement Agreement ¶4(b): The Duty to Reassign

We begin our review with the clause on which Petitioner relies, which states that the settlement agreement will expire if:

> GAO determines in good faith to discontinue the Issue Area Library, in which case GAO will reassign employee to duties that it determines in good faith will continue to provide employee with opportunities to develop skills, knowledge and capability to qualify her for upward mobility.

Settlement Agreement ¶4(b). The language of ¶4(b) does not reveal whether it applies or does not apply to the RIF situation presented here.

Looking at the entire agreement, ¶4(b) can be seen as an insurance clause against an Agency policy change or effort to undermine the effect of the agreement by abolishing the specific position being created for Petitioner as part of the agreement. Mr. Paul Thompson, Agency counsel who participated in drafting the agreement, testified that such a RIF event "wasn't even on the radar screen" at the time the agreement was reached. TR 72. He elaborated that the provision was designed to protect Petitioner in case the Agency later determined that the newly-created position could not last. TR 72.

Petitioner's counsel at the time of the agreement, Ms. Amy Wind, testified that she intended the provision to cover any RIF from the position outlined in the agreement: "[T]here was never any discussion that she would be protected from RIFs for the rest of her life. It was this library job that she was protected for." TR 13. She went on to explain:

> Well, we were hoping that her superiors would be exercising good faith so that if they really were going to, if they were going to do something with the library, they were deciding that in good faith and they weren't doing that just to get our client.

TR 13. While not directly stating that she discussed the possibility of a RIF with opposing counsel during settlement negotiations, Ms. Wind said that such discussion was "extremely likely." TR 28. On further questioning, however, she explained that her specific recollection of RIF discussion during the 1992 negotiations was: "Just my client and I worrying about they

might try to dump her. But formal RIFs being planned, no, I don't recall that at least. That may be, but I don't recall it." TR 23-24. The bottom line, then, is that the drafters of the agreement did not, clearly and specifically, have a wide-scale staff reduction in mind when the provision was drawn.

Settlement Agreement ¶4(a): The Provision for Lawful Removal

The Agency relies heavily on the first clause of the settlement agreement--¶4(a)--which states that the agreement shall expire if "GAO lawfully removes employee from employment." In this view, the Agency's lawful removal of Petitioner by RIF caused the agreement to expire, which in turn extinguished any duty to reassign Petitioner. The agreement contains neither an explanation of this provision nor any restriction as to the meaning of the terms used. Because the Board concludes that ¶4(b) did not bar the RIF here at issue, we need not decide whether ¶4(a) operated to terminate the agreement before any duty to reassign arose from the provisions of ¶4(b). We will nevertheless address this issue because both parties fully briefed the issue of the meaning of "removal" as used in ¶4(a) of the agreement. As explained below, the Board concludes that Petitioner's argument that the term "remove" is limited to discharge for cause is not sound. However, neither did the provision encompass the Agency-wide RIF scenario which Petitioner faced.

Petitioner contends that ¶4(a) is limited to removal for cause, because "removal" is a term of art in the context of federal employment law, used exclusively to refer to situations involving adverse actions and certain results of poor performance. Thus, by definition a separation by RIF cannot fall within this part of the termination clause, because a RIF involves an action directed at organizational structure or positions rather than a "removal" in the sense of a negative action aimed at a particular individual as a consequence of wrongdoing, poor performance, or the like. Respondent counters that "removal" is not a term of art and is broad enough to encompass separation pursuant to an Agency-wide RIF. In this view, "removal" carries no negative connotation which would imply that it did not encompass the action to terminate employment via RIF.

In the federal statutory scheme "removal" clearly does appear in provisions to characterize certain adverse actions taken under 5 U.S.C. chapter 75,[4] 5 U.S.C. chapter 43,[5] and other similar

[4]Chapter 75 permits a series of actions, including "removal," suspension for more than 14 days, reduction in grade, reduction in pay, and furlough for up to 30 days. 5 U.S.C. §7512. It specifically does not apply to "a reduction-in-force action under section 3502." 5 U.S.C. §7512(B). The provisions permit covered action for "such cause as will promote the efficiency of the service." 5 U.S.C. §7513(a). Clearly under this statutory scheme "removal" has a specific meaning distinct from a RIF-related action.

[5]In Chapter 43, an agency is authorized to "reduce in grade or remove an employee for unacceptable performance." 5 U.S.C. §4303(a).

statutes.[6] These statutory references to "removal" carry a negative connotation for the individual subject to removal. This is entirely different from the statutory and regulatory scheme designed to insulate individuals from such negative connotations in a RIF, which targets jobs, not individuals.[7]

However, as the Agency points out, Petitioner overstates the case by claiming that "removal" is used exclusively to refer to adverse action type terminations. In the federal statutory scheme it also can be found in the RIF context. For example, 5 U.S.C. §3593(c)(1)(B) provides for reinstatement to the Senior Executive Service (SES) of an appointee who "was removed from the Senior Executive Service . . . due to a reduction in force." Similarly, 5 U.S.C. §3595 also uses the terms "removal" and "RIF" together in several provisions, indicating that "removal" in those instances is defined to include the result of a RIF.[8] The federal statutory scheme therefore does not support Petitioner's contention that "removal" is a term of art not encompassing the RIF situation.[9]

Further support for the conclusion that "removal" is not limited to use in the adverse action-type situation is found in numerous cases cited by Respondent. See, *e.g.*, *Molnar v. Ebasco Constructors*, 986 F.2d 115 (5th Cir. 1993); *Saunders v. Claytor*, 629 F.2d 596 (9th Cir. 1980); *Martin v. Navy*, 61 MSPR 21 (1994). In light of the imprecise and various uses of "removal" in the federal employment context, Petitioner's argument that it cannot encompass the consequence of a RIF must fail.

The testimony of the two attorneys primarily responsible for the provision's drafting reveals no meeting of the minds on this issue. Petitioner's counsel at the settlement, Ms. Wind, gave her view that "removal" as a term of art connotes "some kind of fault, the employee is not doing his

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[6]See 5 U.S.C. §7521 (administrative law judges may be removed "only for good cause established;" RIFs specifically excluded); 5 U.S.C. §7532 (removal necessary or advisable in interests of national security); 5 U.S.C. §7542 (adverse actions against Senior Executive Service members include removals, suspensions); and 5 U.S.C. §1215(a)(3) (disciplinary action includes removal, reduction in grade).

[7]See generally Note, Reduction in Force: A Guide for the Uninitiated, 44 Geo. Wash. L. Rev. 642 (1976).

[8]It should be noted, however, that the general provisions governing RIFs in the federal workforce do not employ the term "removal," but refer to "release" and "separation" of employees. See 5 U.S.C. §3502.

[9]Petitioner's counsel, no doubt inadvertently, in a document request in this case also characterized the Agency's treatment of Petitioner as a "removal." See Resp. Post-Hearing Br., Attach. 1 at 6 ¶3 ("Identify and produce copies of each document which supports Petitioner's removal").

job or has engaged in misconduct, and that is not what you're talking about when you're talking about a RIF." TR 10. On cross-examination, Ms. Wind stated that she did not recall specific conversations during the negotiation process about the meaning of "removal," but that she understood the import of this provision was to preserve the Agency's ability to remove Petitioner for things like misconduct and performance problems. TR 14-15. Mr. Thompson, representing the Agency, stated that he did not recall any discussion of the meaning of "removal" at the drafting stage, but he understood the provision was designed "to reserve whatever rights GAO had to lawfully terminate her employment." TR 71. In his opinion, that would include a lawful separation by RIF. TR 87.

The agreement itself provides no guidance as to the meaning of "removal" in ¶4(a), and the term commonly is used imprecisely to cover a range of actions resulting in job loss. One cannot simply infer a restrictive reading of "removal" in the settlement agreement here at issue. The parties at the time of the drafting did not discuss whether "removal" would include a separation by RIF. As we have seen, the circumstances of an Agency-wide RIF were far removed from the drafting of the agreement. Clearly the parties did not mutually intend to protect management RIF prerogatives in the provisions of ¶4(a). This provision, like the duty to reassign provision of ¶4(b), does not apply to the matter at hand.

Petitioner's Burden

It must be noted that because ¶4(b) was drafted to protect Petitioner, it was incumbent on Petitioner to expressly secure all desired protection in its drafting. See Restatement of the Law of Contracts 2d §206 at 105. In construing the meaning of words in a contract, we look to the ordinary meaning of the written words to parties "of the kind who contracted at the time and place where the contract was made and with such circumstances as surround its making." Williston on Contracts 3d Ed. §607 at 378. This settlement agreement was drafted by attorneys representing two opposing parties in a context where protection against action directed at eliminating the new position created for Petitioner was the driving force. The language used and the testimony of the drafters do not call for application of the provision to Petitioner's separation as a consequence of an action not directed at her particular position, but in which her position was eliminated--four years later--as part of an unforeseen and wide-spread Reduction-in-Force. Certainly one cannot read into this agreement anything which "precluded the agency from taking a RIF action against appellant in perpetuity." *Medina-Rodriguez v. Veterans Administration*, 21 MSPR 679, 681 (1984). The agreement did not foreclose the Agency from invoking RIF regulations for legitimate management reasons in an Agency-wide downsizing four years after the settlement. See *id*.

Moreover, the position which Petitioner advocates represents a substantial modification of management's ordinary prerogative to organize the workforce as it sees fit. In the federal sector, management's inherent authority to structure the workforce is governed by extensive regulations designed to assure fairness in workforce reductions. See 5 C.F.R. Part 351. These same

regulations recognize management's prerogative to determine "the categories within which positions are required, where they are to be located, and when they are to be filled, abolished, or vacated." *Id.* §351.201(a)(1). The layoff authority of federal managers is also recognized in 5 U.S.C. §7106, governing labor-management relations in the federal government.

Petitioner's argument attempts to read into the agreement a substantial limitation on the Agency's right to structure its workforce in light of Agency mission.[10] Such a substantial modification of management's broad authority to organize its workforce should not be read into an agreement where it is not expressly provided for. "It is a reasonable interpretation device to conclude that what someone has not said, someone has not meant." *Consolidated Gas Supply Corp. v. FERC*, 745 F.2d 281, 291 (4th Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

Indeed, here Petitioner implicitly acknowledges the Agency's ultimate retention of the basic right to RIF. Petitioner claims that she bargained for and obtained in the settlement agreement a right to be immunized against one RIF, and thereafter, the Agency would have a right to RIF her. But nothing in the agreement expressly grants this second RIF possibility to the Agency. Therefore, Petitioner must believe the Agency possesses such authority inherently, absent an express agreement to the contrary. As we have seen, Petitioner here did not achieve a clear modification of the management right to RIF.

The ultimate outcome of Petitioner's argument is that another employee should have been RIFed in her place. There is a serious legal question (which need not be resolved definitively here) as to whether the Agency had the authority to agree to an exception to the RIF process when the consequence would be to alter another employee's right to retention in order to accommodate Petitioner. Such an agreement would jeopardize the intended fair treatment of all employees which underlies the very specific rules governing RIFs. See GAO Order 2351.1; 5 C.F.R. Part 351 (executive branch). Given the potential compromise of others' rights, the burden is even greater on Petitioner to prove that the Agency expressly confronted and took a stand on that inherent legal question. One should not lightly undertake to interpret an ambiguous agreement as definitively determining the rights of persons who were not parties to that agreement. See Restatement of the Law of Contracts 2d §207 (favor public interest where contract is ambiguous).

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[10] A federal Reduction-in-Force is analogous to a layoff in the private sector. See Broida, 1997 Guide to MSPB Law and Practice at 1858; Reduction in Force: The Evolving Ground Rules at 1 (MSPB 1987). In the private sector, the employer generally maintains all rights of management which are not expressly altered by a collective bargaining agreement. The private employer retains the full right to layoff unless the collective bargaining agreement expressly limits and conditions that right. Similarly, a settlement agreement is an individual's attempt to do individually what a collective bargaining agreement does collectively. That is, it is an attempt to limit and condition the exercise of what are otherwise plenary rights of management to determine the composition and size of the workforce needed to accomplish business goals.

In light of the implications flowing from Petitioner's interpretation of ¶4(b), most likely the Agency was only holding open, in the settlement agreement, the kind of re-arrangements that could be made without impacting on another employee or employees. For example, the provision would have applied in the event that the library had closed and Petitioner was moved to another open job. This scenario would have been possible if the Food/Agriculture Issue Area return to headquarters had taken place on its original schedule and outside the environment of a large-scale RIF. The provision about reassignment to a new job, if the library was closed, also may have been designed to allay Petitioner's concern about a bad faith closing of the library. Petitioner did not allege that the closing of the library was done in bad faith to target her personally for removal.

The wide-scale RIF resulting in Petitioner's job being abolished was an event unanticipated by either party at the time of the agreement's drafting. Neither the testimony adduced at the hearing nor the drafted language of the agreement support the conclusion that general RIF protection was behind this provision. Rather, this clause offered protection against an Agency action aimed specifically at the position. It stretches the intent too far to apply the provision to the elimination of the library position as part of an Agency-wide RIF driven by substantial budget reductions imposed by Congress and unforeseen at the time the settlement agreement was drafted. Clearly there was no mutual intent that the provision would have such an application. The termination provision in ¶4(b) therefore did not apply because it was not intended to apply to wide-scale staff reductions at the Agency.

It is worth noting that GAO's RIF authority was strengthened in recent amendments to the General Accounting Office Personnel Act (GAOPA). In 1995, Congress broadened GAO's discretion in conducting RIFs as compared to the normal managerial discretion accorded to executive agencies. The Agency now may give due effect to "performance and/or contributions to the agency's goals and objectives" in conducting a RIF.[11] 31 U.S.C. §732(h). The amendments also specifically provide that GAO's regulations "shall, to the extent deemed feasible by the Comptroller General, be designed to minimize disruption to the Office and to assist in promoting the efficiency of the Office."[12] *Id.* Thus, GAO's statutory RIF mandate is somewhat larger than that applicable to the executive branch.

The RIF Context

Petitioner contends that the Agency's duty to reassign her attached at the point in January 1996 when the decision was made to close the Issue Area library and in effect terminate her position. This timing preceded her RIF notice by two or three months, and occurred while general RIF

[11]In contrast, the statutory provision governing RIFs in the executive branch requires that due effect be given to "efficiency or performance ratings." 5 U.S.C. §3502(a)(4).

[12]The executive branch statute does not contain a broadly worded statement that RIF regulations be designed to minimize disruption in a given agency or the like. See 5 U.S.C. §3502.

discussions and planning were ongoing. In this view, the duty to reassign preceded the RIF. Thus, the ¶4(b) reassignment obligation would have been triggered before Petitioner was separated from employment.

In the language of ¶4(b), the triggering event is the Agency's determination in good faith to discontinue the library. While the record offers conflicting evidence as to when the actual decision was made to discontinue the library,[13] the Agency stipulated at the hearing that the determination was made by the end of January 1996.[14] TR 67. Mr. Wells testified that the decision, as distinguished from speculation, to close the library occurred in the context of discussions concerning streamlining in RCED and identification of which positions were critical and which were not. TR 133-34. Similarly, Mr. Robinson, who became Issue Area director in January 1996, indicated in his testimony that the discussion concerning termination of the library took place in the context of serious budget cuts and comprehensive planning for functioning in a leaner manner, with awareness that the special usefulness of the library would be eliminated upon the return to headquarters. TR 148-52, 156-57. Even Petitioner testified that from August or September 1995 she was aware of the upcoming large-scale RIF of support staff. TR 51. Thus, the discussions concerning closing the library took place with the backdrop of the impending wide-scale staff reductions. In light of the Comptroller General's August 1995 memorandum and the ongoing discussions about RIFs and downsizing, it is clear that the decision to eliminate the Issue Area library became intertwined with the RIF and downsizing decisions.

The context of the decision to close the library is not insignificant. The Agency's duty to reassign Petitioner, as described in ¶4(b), must be read consistent with the laws, rules and regulations otherwise governing the Agency's actions in the context of a wide-scale RIF. In this case, the decision to close the Issue Area library clearly arose amidst sweeping budget and staff cuts and months-long management discussions concerning which functions needed to be preserved. This

[13]Petitioner testified that rumors were afloat in the Fall of 1995 that the library would be discontinued when the Issue Area moved back to headquarters. TR 42. She further testified that her supervisor, Mr. Thomas Kai, broached that possibility with her in October 1995. As a result, she began to weed through library holdings. TR 50. Mr. Robert Robinson, Issue Area director for food and agriculture, testified that he told Mr. Wells during the downsizing that the Issue Area library was not critical, in light of the impending move back to headquarters. TR 149. Mr. Wells testified that it was early 1996 when the decision was made to discontinue the library. TR 135-36. The Comptroller General's August 1995 memorandum and delegation to the ACG/Ops to conduct a RIF of APSS personnel was issued before any discussion took place, or decision was made, to close the Issue Area library.

[14]James Wells, RCED director of operations, testified to that effect, relying on Mr. Robert Robinson's recommendation that the function of the Issue Area library was not considered critical in the downsizing review, particularly in light of the upcoming return of the Issue Area to headquarters. TR 104, 135-36.

was not an isolated determination that Petitioner's peculiar function was no longer necessary. In view of the ongoing wide-scale RIF, Petitioner's employment rights necessarily were determined in accordance with applicable statutory and regulatory provisions. Those provisions dictate the steps the Agency must take to assure fairness to all employees as downsizing decisions are made.[15]

GAO is required by statute to prescribe and follow regulations for the orderly release of individuals in a RIF which "give due effect to tenure of employment, military preference, performance and/or contributions to the agency's goals and objectives, and length of service. The regulations shall, to the extent deemed feasible by the Comptroller General, be designed to minimize disruption to the Office and to assist in promoting the efficiency of the Office." 31 U.S.C. §732(h). For GAO, the governing regulatory provisions are found in Order 2351.1, Reduction in Force (Feb. 28, 1996). The Order details specific procedures to be followed in determining the placement of individuals whose jobs are eliminated in a RIF.

The determination to close the library and abolish the Issue Area librarian position was made as part of management decisionmaking as to which positions were least critical to the division in view of the mandatory, significant downsizing. In this situation, the Agency was obligated to and did handle its obligation to reassign Petitioner by applying the RIF Order's provisions for equitable implementation of the need to abolish a number of positions. RCED management was told what number of APSS positions to cut, reviewed the relative need for the various slots, and determined which positions would, accordingly, be eliminated. After that sequence was completed, Petitioner was identified as an individual subject to RIF, and the determination was made that she did not have assignment rights.[16] In this case, the RIF occurred over a period of months concurrent with the decision to abolish the Issue Area library. The closing of the library was handled properly in the context of an Agency-wide RIF. By implementing the Agency-wide RIF in a neutral manner, the Agency insured that no one was unjustifiably cut as a consequence of the ¶4(b) provision concerning the duty to reassign Petitioner.

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[15]The underlying thrust of the federal RIF process was explained in the executive branch context by the Federal Circuit in *Grier v. Dept. of Health & Human Services*. In that case, the court pointed out that RIF regulations:

> provide the administrative process through which the government eliminates jobs and deals with the employees who formerly occupied the abolished positions. Unlike adverse actions, RIFs are not aimed at removing particular individuals; rather, they are directed solely at positions. After the agency has decided to eliminate positions as a matter of its independent managerial discretion, the identification of affected employees is governed by OPM regulations.

750 F.2d 944, 945-46 (1984).

[16]No challenge has been made by Petitioner to the technical determination concerning her standing on the RIF register.

CONCLUSION

For the reasons set for above, the Board concludes that the Agency acted lawfully in applying its Reduction-in-Force procedures to Petitioner, ultimately resulting in her separation from employment. The settlement agreement entered into between Petitioner and the Agency in April 1992 did not bar the action taken in this circumstance. Accordingly, the Petition for Enforcement is hereby **denied** and the RIF action resulting in Petitioner's retirement is sustained.

SO ORDERED.